

**Comcraft, Inc. and Communications Workers of America, Local 9503, AFL-CIO. Case 31-CA-20519**

May 22, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On February 17, 1995, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and the General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

The General Counsel has excepted to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing, as required by its collective-bargaining agreement with the Union, to provide the Union with an updated monthly roster of bargaining unit employees, including, inter alia, their names and dates of employment. The judge found that this allegation was time barred by Section 10(b) of the Act. We find merit in the General Counsel's exceptions.

Article 5 of the parties' collective-bargaining agreement requires the Respondent to furnish the Union with an updated roster of all bargaining unit employees. In December 1992, the Respondent hired four new employees to perform bargaining unit work, and in August 1993, the Respondent hired eight others. These new employees signed union membership applications and returned them to the Respondent, but the Respondent did not submit these applications to the Union and did not notify the Union that it had hired these employees as required by the collective-bargaining agreement.

In January 1994, at a union meeting, the Union first learned of the existence of these 12 new employees. On February 16, 1994, the Union's Chief Steward

Steve Courtemarsh conducted another union meeting that was attended by all of the new employees. On February 23, 1994, Courtemarsh met with the Respondent's president and chief executive officer, Dominick Macaluso, and asked him why the 12 employees had not been reported to the Union. Macaluso responded that he did not think that temporary employees had to join the Union.

The judge dismissed the 8(a)(5) and (1) allegation. Although the judge found that the Respondent failed to honor the relevant portion of the collective-bargaining agreement requiring the Respondent to report new employees to the Union, and that such a breach would violate Section 8(a)(5), he concluded that this conduct was not reachable in this proceeding. The judge reasoned that because the charge was filed on April 13, 1994, the 6-month 10(b) period extends back only to October 13, 1993. Because the last hire that the Respondent should have reported to the Union occurred in August 1993, the judge concluded that the statute of limitations bars any remedy for the Respondent's violation.

We disagree with the judge and find that this allegation is not barred by Section 10(b) of the Act. It is well settled that the 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct constituting the alleged unfair labor practice. *P & C Lighting Center*, 301 NLRB 828 (1991); *Pinter Bros.*, 263 NLRB 723, 739 (1982). It is the Respondent's burden to establish that the Union knew or should have known more than 6 months before the charge was filed that the Respondent had hired new employees and had not reported them to the Union. *Pinter Bros.*, supra. Here, the Respondent presented no evidence to contradict the General Counsel's showing that the Union first learned of the failure to report the new employees in January 1994, when the Union held a meeting with the Respondent's unit employees and several of the new employees attended. Nor has the Respondent shown, or even asserted, that the Union would have known at an earlier date of the existence of the new employees had it exercised due diligence in monitoring the shop.<sup>3</sup> Ac-

<sup>1</sup>The Respondent has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We shall modify the recommended Order and substitute a new notice to provide a remedy for the 8(a)(5) violation found below, to conform the cease-and-desist provision to that traditionally used by the Board, and to correct minor inadvertent errors.

<sup>3</sup>Cf. *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), in which the Board found that the union was chargeable with constructive knowledge because of its failure to exercise reasonable diligence by which it would have learned much earlier of the respondent's contractual noncompliance. In that case the Board found that mere observation would have put the respondent on notice that the number of unit employees was at least double the number reported on the respondent's fringe benefit forms. By contrast, in the instant case, the Respondent has not established, nor even argued, that mere observation would have alerted the Union as to the existence of the new employees. The employees here did not work at one facility. Rather, they were dispatched to other sites for varying periods of time to perform their work. Generally, if a job lasted more than 1 day, the employees reported directly to the site rather than to any centralized location. Thus, the discrepancy in reporting could not

cordingly, because the charge was filed on April 13, 1994, less than 6 months after the Union first became aware of the failure to report, we find that the charge was timely.

We agree with the judge's findings, to which the Respondent has not excepted, that the Respondent failed to honor that portion of the collective-bargaining agreement with the Union that required it to report the hiring of new employees to the Union, and that such a breach would have violated Section 8(a)(5) if it had occurred within the 10(b) period. The provision of its collective-bargaining agreement to which the Respondent unilaterally failed to adhere was plainly a mandatory subject of bargaining. We conclude that by this conduct, which we find occurred within the 10(b) period, the Respondent has failed to bargain in good faith with the Union within the meaning of Section 8(a)(5) and (1) of the Act.

#### AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 4.

"4. By failing to provide the Union with an updated monthly roster of bargaining unit employees as required in the collective-bargaining agreement with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Comcraft, Inc., Northridge and Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and insert the following as paragraph 1(c).

"(b) Failing to provide the Union with an updated monthly roster of bargaining unit employees as required in the collective-bargaining agreement with the Union."

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Provide the Union with an updated monthly roster of bargaining unit employees as required in the collective-bargaining agreement with the Union."

have been readily discovered by the Union merely by visiting the Respondent's offices during operating hours. Under these circumstances, unlike in *Moeller*, we cannot attribute to the Union constructive knowledge prior to January 1994 of the Respondent's failure to report the new employees. Accordingly, we agree with the General Counsel that the 10(b) period begins in January 1994 when the Union obtained actual knowledge that the new employees had been hired.

3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting or joining or seeking to support or join Communications Workers of America, Local 9503, AFL-CIO, or any other labor organization.

WE WILL NOT fail to provide the Union with an updated monthly roster of bargaining unit employees as required in the collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately offer Herndon Greene and Johnny Pitts immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them, including interest. WE WILL treat them in the same manner as if they had been employed in May 1994 and convert them to permanent full-time employees as we did others at that time and they will be entitled to all of the benefits that a full-time permanent employee would normally have enjoyed from that date, except that no new probationary period may be imposed on them.

WE WILL remove from our files any reference to the unlawful discharges of Greene and Pitts and WE WILL notify them in writing that we have done so and that we will not use the discharges against them in any way.

WE WILL provide the Union with an updated monthly roster of bargaining unit employees as required in the collective-bargaining agreement with the Union.

COMCRAFT, INC.

*Alice J. Garfield*, for the General Counsel.

*Howard M. Knee (Knee & Mason)*, of Los Angeles, California, for the Respondent.

*Steve Courtemarsh*, of Los Angeles, California, Chief Steward, Communications Workers of America, Local 9503, AFL-CIO.

## DECISION

## STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. I heard this case in Los Angeles, California, on September 22–23, 1994.<sup>1</sup> The complaint was issued by the Acting Director for Region 31 of the National Labor Relations Board on May 27; it is based on an unfair labor practice charge originally filed on April 13 and amended on May 27, by Communications Workers of America, Local 9503 AFL–CIO (the Union or CWA). The complaint alleges that Comcraft, Inc. (Respondent) has committed certain violations of Section 8(a)(3), (5), and (1) of National Labor Relations Act (the Act).

## Issues

The complaint asserts that Respondent has violated Section 8(a)(5) and (3) of the Act in two ways. First, it asserts that since at least November 3, 1993, Respondent has failed, as required by its collective-bargaining contract with the Union, to provide the Union with an updated monthly roster of bargaining unit employees, including their names and dates of employment as well as other relevant material. Second, it asserts that on February 25, Respondent discharged its employees Herndon Greene and Johnnie Pitts, essentially because they obtained representation by the Union. Respondent denies the assertion and contends that Greene and Pitts were discharged for nondiscriminatory reasons, including the fact that they were temporary employees who it contends were not in the bargaining unit.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs that have been carefully considered. Based on the entire record of the case as well as my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Respondent admits it is a corporation having offices and places of business in Northridge and Los Angeles, California, where it is engaged in the business of installing and repairing telecommunications systems. The evidence also shows that it has offices in Santa Rosa, California, and Grants Pass and Salem, Oregon. It further admits that during the previous calendar year it has provided services valued in excess of \$50,000 to the City of Los Angeles, a public entity that is engaged in interstate commerce. It therefore admits that it is an employer engaged commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

Beginning in November 1989 Respondent has had a business contract or business relationship with the city of Los Angeles to provide it with certain telephone and telecommunications interconnect services. In essence Respondent has provided construction, maintenance, and repair services to the city concerning its telephone system. Even prior to 1989 it had done so as a subcontractor of Pacific Bell. The business arrangement that began in 1989 was on a 1-year basis, ending on October 31, 1990. The contract did, however, contain renewal options for the years 1991–1992 and 1992–1993. Thereafter it was renewed on a month-to-month basis.

In late 1993, the contract was put out to public bid; on May 4, 1994, Respondent was awarded the contract again, lasting through April 30, 1995.

In addition, Respondent has a collective-bargaining relationship with the Union. That contract was executed on March 29, 1989, for a 1-year period and contains a self-renewal clause. The parties allowed that contract annually to renew itself up through early 1994, when the Union sought to begin negotiations for a new agreement.

Respondent is owned by Dominick Macaluso. He is its president and chief executive officer. He generally works, however, at Respondent's Grants Pass, Oregon headquarters. The day-to-day operations for Los Angeles city work are handled from an office located in the basement of the city hall. Until November 1993, the individual who performed those duties was Sergio Melendez, the project manager. Upon his departure that month he was replaced, at least in part, by Fred Keller. Respondent also has officials located at the Northridge office, approximately a 25-mile distance from downtown Los Angeles.

Respondent asserts that it employs between 20 and 30 persons who actually engage in the work of telephone and telecommunication installation. The collective-bargaining contract contains a recognition clause, article 3, section 1, in which it recognizes the Union as the exclusive collective-bargaining representative for persons known as: trainee, installer, lead installer, technician, and lead technician.

Article 1, section 3 is a union-security clause that is a reasonably standard union-shop clause requiring employees to join the Union after serving a 30-day grace period. In addition, the contract contains a clause permitting employees to voluntarily check off dues from their salary payments and also requires, per article 5, Respondent to furnish the Union, on a monthly basis, an updated roster of all bargaining unit employees, including their names, dates of hire, social security numbers, titles, rate of pay, dues, and CWA membership status for employees hired, rehired, entering or returning from absences, those who have revoked their authorization to deduct union dues, or those who are leaving the Company.

## B. Respondent's Operations Under the Collective-Bargaining Contract

Despite the fact that the collective-bargaining contract sets forth five specific job classifications together with wage rates, Respondent does not actually classify its employees in

<sup>1</sup> All dates are 1994 unless otherwise noted.

such a way. Instead, it appears to hire individuals at the entry level job of "cable puller," which may in fact actually be the same job as "trainee." The contract does mention, but does not clearly define the scope of, individuals who may be "part-time" or "temporary." Thus, it appears that the contract does not prohibit Respondent from hiring part-time employees or temporary employees. The contract does, however, exclude anybody hired as a temporary from some of the contract benefits, including holiday pay and certain fringe benefits. Nonetheless, temporaries who are employed in the capacity of trainee/cable puller, installer, or technician perform exactly the same work that permanent employees assigned to those tasks perform.

In December 1992, Respondent began hiring persons as "cable pullers" on a "temporary" basis. That month Respondent hired four temporary cable pullers (Amador, Bainton, Perez, and Johnson). Then, in August 1993, it hired eight more temporary cable pullers. These included the two individuals who were eventually discharged on February 25, Greene and Pitts.<sup>2</sup>

Respondent reported none of these individuals to the Union. It paid them \$6 per hour.

As time went by, these individuals, as well as the regular employees, became concerned that perhaps their pay rate was inappropriate. Some came to believe that they were entitled to a prevailing wage rate as provided either by the Davis-Bacon Act or by the state law, which also requires prevailing wages to be paid on public works construction projects. There appears to be some debate about whether those laws actually apply; some view it as construction work while others consider it industrial work.

Moreover, some of the temporary employees, specifically Greene, came to believe in late December 1993, that they were entitled to holiday pay. The rationale was that since they had worked past the 90-day probationary period, which everyone seems to be aware of (and which is found in the collective-bargaining contract), that they had become permanent employees. That logic is not entirely acceptable, but at the same time the four original temporaries at that point had been working over a year and the eight newer temporaries had been working for over 4 months.

Indeed, Greene testified that when he was hired, the individual who interviewed him, Brian Davis of the Northridge office, had told him that although he was being hired as a temporary, if he lasted 90 days he would become permanent. Also, when the eight were hired in August, each was asked to fill out various documents relating to hire. Those papers consisted of several standard forms (including a W-4 form) and other documents, as well as a blue membership application card for the CWA. It is undisputed that Respondent did not process those CWA applications and did not send the cards on to the Union.

As an aside, I observe that the eight employees hired in August 1993 had come to Respondent through its use of the placement program of a local technical college from which the eight had recently graduated with certificates of training in the interconnect field. Indeed, many had purchased the appropriate tools. They were put straight to work utilizing the skills the technical college had taught them. In addition, of

course, they were trained on the job by more experienced personnel.

### *C. The Events Leading to Discharge of Greene and Pitts*

In January, the Union decided it was time to negotiate a new collective-bargaining contract with Respondent. Accordingly, it sent out notices to Respondent's employees that a meeting was to be conducted on January 16 at the Union's Northridge office. The meeting was conducted by Margaret Shoemaker and Nancy Pacheco. Pacheco was the outgoing executive vice president of the local and Shoemaker was her successor. Although it is not clear how many of the 12 "temporaries" attended that meeting, a large number did, including Greene and Pitts. Shoemaker quickly realized that there was a group of Respondent's employees about whom the Union knew nothing. She also learned that that these individuals had concerns about not receiving what they thought were benefits under contract. She heard complaints regarding holiday pay, the prevailing wage question and other matters. She asked the temporaries who were present to fill out a blue application card and they did so again.

After the meeting, she decided that the matter needed further investigating, so she directed the union's chief steward, Steve Courtemarsh, to conduct a further inquiry. Courtemarsh held another meeting on February 16 at a union office on Wilshire Boulevard. This time all 12 of the temporaries attended but only Greene and Pitts voiced complaints, again regarding wages, holiday pay, and fringe benefits. At that meeting Greene filled out a grievance statement in which he described his concern about not having received holiday pay for Christmas and New Years, though he had passed what he believed to be his 90-day probationary period. In addition, all 12 once again filled out the blue membership application forms.

Courtemarsh now realized the full extent of the Company's failure to report the existence of these employees. At the same time he had been directed to negotiate a new collective-bargaining contract with Respondent. It was he who in 1989 had negotiated the original agreement with Company President Macaluso, so he decided to approach Macaluso about both matters.

He testified that on February 22, he telephoned Macaluso to try to make an appointment but was somewhat unsuccessful. He said Macaluso put him off telling him that he was worried the City of Los Angeles might not renew the Company's business contract. Yet, the following day, February 23, Macaluso telephoned Courtemarsh and suggested that he come to the Company's office to have coffee, so he did. Initially, according to Courtemarsh their conversation was cordial (the two had been social acquaintances in the past) and Courtemarsh says he became rather optimistic about obtaining a new collective-bargaining contract.

He said they then began to discuss the prevailing wage issue, with Courtemarsh contending that it seemed likely that the Company was bound to pay the prevailing wage under either the Federal or state law. Macaluso assured him that him that he didn't think so and said the matter was in a legal process of being determined. He agreed to provide Courtemarsh with the documents supporting his position.

Courtemarsh then turned to the 12 temporary employees, telling Macaluso that he had met with them a week before

<sup>2</sup>The other six are Usher, Clark, F. Smith, Ortiz, Hillstock, and E. Smith.

on February 16, observing candidly that the employees were unhappy both with the Company and with the Union's representation of them. Courtemarsh went on to say:

And I said they [the 12] had some issues that—in regards to prevailing wage and not receiving holiday pay, and I questioned why . . . the 12 temporary employees were not reported to the union. And Dominick said that he didn't think that temporary employees had to join the union. And I told him, I said that anybody that does bargaining [unit] work had a responsibility to join the union. And he disagreed. And he said he would talk to his attorney about that, and I said fine. And I said, "One of the most important things I want to do today is get an agreement that these people will be allowed into the union, because some of them have been working for the company for a year and a half."

And at that time Dominick asked how we would do that, and I said, "Well, it shouldn't be that much of a problem." I said that the guys are "just asking for some holiday pay that they didn't get, and they'd like to have medical benefits." So I said, "Well, we can just kind of grandfather them into the unit, give them some holiday pay, and start them on medical benefits." And Dominick said that, "Well, if I did that, then it would be 90 days before [his] insurance carrier would allow them coverage." And I said, "Well, we'll have to live with that then. That shouldn't be a problem. That's the way its got to be, that's way it's got to be."

After that exchange, Courtemarsh says Macaluso thought about the situation for a minute. Then, all of a sudden, he said, "Well, I'll fire them all first." Courtemarsh says he was taken aback by that response and asked on what grounds would he fire them all. He says Macaluso replied, "'For poor work performance.' And I thought about it and I said, 'Well how would you justify firing all these people for poor work performance when they have been working for you that long?' I said, 'Do you have any documentation to support that? You probably don't have any documentation to support anything like that, so how can you justify that?' And he says, 'Well then, I'll just lay them all off.'"

Courtemarsh says he could observe that Macaluso had become very upset so he decided to back off saying, "I hate to see you fire them all . . . it's my intention to see that these people get into the union one way or the other, and I'm going to work to that end." At that point the meeting concluded.

Macaluso does not really deny Courtemarsh's version. He did testify that Courtemarsh "told me that he thought they should be in the bargaining unit and not temps. And I said, 'I disagree, you know, that I don't believe they are covered by the bargaining Agreement, and they were hired as temps.' And he wanted them in the Union, and I wasn't sure because like I said—the Union contract, I haven't seen it within 4 or 5 years. I mean the contract is actually a span from 1988 to present . . . and I know that I did say that 'I would probably have to lay off a few of the temps.' Now that I did say." He denies getting into why he was laying them off. During the hearing he explained that he did not tell Courtemarsh the reasons for the layoff because Courtemarsh "didn't ask." He also says he didn't tell Courtemarsh that the city work had

slowed down nor did he tell him about any meetings he had had with city officials, again because Courtemarsh "didn't ask."

With respect to both the slowdown of City work and the meeting he had had with Don Keith, the City's Director of General/Communications Services and Frank Gonzalez, the City Engineer, Macaluso gave some unclear testimony regarding when he made the decision to lay off two of the temporary employees.

The reason for their layoff, according to Macaluso, was the fact that the City had begun withholding work orders and as a result, Respondent's billings had fallen off, dramatically in his opinion. He claims that the slowdown began in January 1994 triggering a trip to Los Angeles from Grants Pass to meet with the city officials. He does not have a specific date for that meeting, but says in early February he decided to lay two people off.

At some point, however, he did meet with Keith and Gonzalez. At that meeting Gonzalez admitted to both Keith and Macaluso that the engineering department, in the belief that a new contractor might be taking over due to the new bid, had withheld work orders. Keith, his superior, directed the engineering department to resume providing work orders at the same rate as it always had, because he did not wish any new contractor to be overwhelmed by a crush of orders that it could not handle. Accordingly, he gave directions to Gonzalez to resume the previous work level.

The timing of all of this is a bit unclear. Macaluso testified at one point that he had made the decision to lay off the two temporaries sometime in early February, perhaps the second week. He remembers it because that was when he came to Los Angeles from Grants Pass to have the meeting with Keith and Gonzalez. Later, he testified that he made the decision to lay off Pitts and Greene "sometime prior to February 25." At yet another point he says, "I don't believe I met with the City before I met with Courtemarsh (on February 23). In addition, he says he gave instructions to his project manager, Keller, to select the two persons for layoff about a week before the actual layoff."

It is again worth noting that on cross-examination, Macaluso said that he did not advise Courtemarsh either of his decision to lay off two individuals or of his meeting with the city officials because Courtemarsh "didn't ask." He did not assert that he had not yet had the meeting with the city officials. Nor did he assert that he had made a decision to discharge the two.

With respect to the events of February 25, Greene testified that on February 24 he had been assigned to work at a large project, the Southwest Police Station. He said there seemed to be quite a bit of work to do, in his judgment, about 2 to 3 weeks. Indeed, the Southwest Police Station job was still in progress at the time of the hearing, some 8 months later. He observed his project leadman, Price Rogers, telephone Keller at City Hall that day to ask him for additional men. On the following day, February 25, Keller appeared at the site with Pitts. Instead of Pitts joining the crew as might be expected, however Keller took both Pitts and Greene to a separate room where he advised them that they were being laid off because of lack of work.

Both Pitts and Greene recall that Keller was most apologetic, saying that the decision was not his. Greene remembers Keller also saying that if more work came in, "You'll

be the first to be called back.” Pitts did not recall that and Keller denies it. Nonetheless, I do not think it is unreasonable for Greene to have extrapolated that thought from Keller’s handling of the situation.

Macaluso says he selected Greene and Pitts for layoff based on Keller’s recommendation. Keller says he selected Pitts because he was “slow” and he could not send Pitts out on jobs by himself. That information, however, was second-hand, coming from his two leadmen Rogers and Neiswonger. Keller says that they told him Pitts was “not ready to be a technician.” That seems to be a somewhat odd statement, because no one ever suggested that Pitts’ limited experience qualified him to be a technician. At best, he was a trainee and/or cable puller who was still learning. Keller then backtracked a bit and said that Pitts wasn’t ready to be an installer either.

Keller says he selected Greene for layoff because he didn’t believe he was working fast enough in the allotted time period. He does agree that Greene was able to work on his own and had been doing installer and technician work. Greene says he had been sent by himself to jobs at least 25 times.

The collective-bargaining agreement describes the types of tools that an employee is expected to purchase once he has reached a specific level of skill. Both Greene and Pitts testified that they had been directed by Macaluso to purchase tools at the skill level of at least an installer, if not of technician.

Furthermore, neither Greene nor Pitts had ever been advised by any management person, either Keller, his predecessor Melendez, or the leadmen Rogers and Neiswonger, that they needed either to improve their speed or the quality of their workmanship. Indeed, Keller admits he had exhorted the staff generally to pick up its speed, but never told anyone in particular that they were having a specific problem. Keller explains that he did not tell either of these two individuals of their shortcomings because they were regarded as “temps” and he didn’t believe he needed to concern himself with that.

#### IV. ANALYSIS AND CONCLUSIONS

The essential issue in this case is whether or not Macaluso took a reprisal in response to Courtemarsh’s insistence that the temporary employees be considered regular full-time employees and thus entitled to full benefits under the collective-bargaining contract. In this regard, the most salient fact is that Macaluso had made a deliberate decision not to report any of the 12 temporary employees to the Union. As a benefit to Respondent, 4 of them worked for over a year and 8 of them worked from August 1993 to January 1994, without its having to pay fringe benefit costs, a form of free overhead, until the Union discovered the presence of all 12 on the payroll. When Courtemarsh raised the issue, Macaluso argued that he was not obligated to tell the Union about them because they were only temporaries and they were not entitled to “be in the bargaining unit.”

Whether the temporary employees are or are not properly included in the bargaining unit is, in some respects, beside the point. Even so, Respondent’s temporary employees are in the unit by contract. Compare *Pennsylvania Electric Co.*, 289 NLRB 1200 (1988). The only real issue is whether these two individuals were discharged as a result of Courtemarsh’s contention that the temporaries belonged in the bargaining unit.

His description of Macaluso’s reaction to his request: “I’ll fire them first,” followed by the discharge of two of them 2 days later clearly establishes a prima facie case that Respondent fired them for that reason.

First, union animus is quite clear. Macaluso deliberately withheld the information from the Union that he had hired 12 temporary employees. The clause in the collective-bargaining contract dealing with reporting employees to the Union makes no distinction regarding whether such hires are regarded as regular full-time, regular part-time, temporary or any other possible status. It requires Respondent to report all hires to the Union. It is at that point that their entitlement to rights under the collective-bargaining contract become determined. The fact that a temporary employee is not entitled, by contract terms, to holiday pay or medical or retirement benefits does not mean that he is to be regarded as unrepresented. It simply means that those are specific benefits to which he is not entitled. The employee is still entitled to the contract rate of pay, to other benefits and may also be obligated to join the Union under the union-security clause. Furthermore, the Union is entitled to track so called temporary employees in order to determine whether that appellation actually describes their status. Indeed, that very problem occurred here, for none of these 12 knew how long their “temporary” status was to last. It was not until it became aware of them that the Union began making efforts to convert them from temporary to regular full-time status.

Usually a temporary employee is hired for a finite period of time or until a specific event occurs, often the completion of a specific job.<sup>3</sup> Here, that was not the case. Macaluso’s explanation that he regarded them as “temporary” because he didn’t know how long his firm would continue to maintain a contractual relationship with the City of Los Angeles is not creditable. Regular full-time and/or permanent employees often are employed for only a short period of time. Indeed, there is no evidence that any of the 12 employees were ever told that their job status depended on whether or not Respondent obtained a new business agreement with the City. Clearly, absent the Union’s specific waiver, temporary employees are in the bargaining unit. Here, there is no evidence of such a waiver. These individuals were clearly in the bargaining unit, both by law and by contract. Furthermore, Respondent in May agreed with the Union to convert the remaining ten to permanent, full-time status, entitled to all the benefits under the collective-bargaining contract.<sup>4</sup>

Thus, Respondent’s animus is apparent: Macaluso cavalierly ignored his collective-bargaining obligation in not reporting the new hires; his purpose behind that action was to keep it secret from the Union, and his explanation for the conduct does not make any real sense except that it is an unpersuasive attempt to justify the secrecy. Nor is there any reason to doubt Courtemarsh’s description of Macaluso’s reaction when he realized that the jig was up.

Furthermore, timing is clearly present. The two were discharged only 2 days after Courtemarsh raised the issue. It is not unreasonable to infer that Respondent knew these two in-

<sup>3</sup> See *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433, 1437-1438 (1958); *M. J. Pirelli & Sons*, 194 NLRB 240, 250 (1971).

<sup>4</sup> For some reason those 10 were required to serve a 90-day probationary period beginning in May. That seems entirely unwarranted given the fact that all of them had served satisfactorily for periods of 9 to 15 months.

dividuals had spoken up during the meeting conducted by Courtemarsh. It is strange indeed that the only two persons who seem to have had the temerity to speak up about their situation are the same two persons who were fired shortly thereafter. I do not regard that situation as mere coincidence, but evidence that Macaluso, probably through Keller's efforts, had pinpointed Greene and Pitts as being as the principals concerned with their right to union representation. In picking those two, Respondent could send a clear message to the group, that asking for rights under the union contract was a dangerous proposition for persons whose employment status was less than perfect.<sup>5</sup>

Clearly the General Counsel has made out a prima facie case that Respondent has taken a reprisal against those who actively sought union representation. See *Ironton Publications*, 313 NLRB 1208, 1212 (1994). That case plainly demonstrates that a bargaining unit employee cannot lawfully be penalized simply because he decides to join the union.

It therefore becomes incumbent upon Respondent to demonstrate that these two individuals would have been fired even in the absence of the elements shown. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To meet that duty, it ignores the evidence of animus, concentrating instead on insisting that the timing was wrong for such a decision. Macaluso's testimony is inconsistent, however, and I do not fully accept Keller's attempt at corroboration. The key, however, is Respondent's claim that the whole decisional process was triggered by a temporary downturn in business which was caused by a City mistake. In this regard, Respondent's timing argument is unpersuasive even if I accept Respondent's sequence. Once Respondent had the meeting with the City officials, whether it was 3 weeks before the discharge or only a few days before the discharge, it knew that the reduced level of work orders was a mistake which had been countermanded. After it learned of the countermand there was no reason to lay anybody off, for work almost immediately resumed its previous level. Indeed, the reduced level of business lasted for only about 2 weeks, perhaps a little longer. Clearly Macaluso knew by the time he focused on Pitts and Greene that the hiccup in business was over. He also admitted that fluctuations in monthly billings were common.

Even aside from that, it is my view that the numbers do not support Respondent's defense. In this regard the total revenues beginning in April 1993 are as follows:

April 1993	\$89,000
May 1993	88,000
June 1993	83,000
August 1993	95,800
September 1993	137,000
October 1993	[not in evidence]
November 1993	132,000
December 1993	135,000
January 1994	98,000
February 1994	64,800

<sup>5</sup> Knowledge of specific employees' union sympathies and activities may be inferred from the surrounding circumstances, including timing, precipitousness of the response or the pretextuous nature of the assigned reason. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

March 1994  
April 1994

71,600  
152,000

As the General Counsel observes, those figures suggest that 1994 is hardly any different from 1993, the same year Respondent found it to be a volume of business sufficient to warrant the hiring of the eight temporaries in August 1993. Although perhaps arguments can be made both ways, Respondent's view is clearly not conclusive and certainly not enough to rebut the prima facie case. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Greene and Pitts on February 25.<sup>6</sup>

Although, however, it is clear that Respondent failed to honor that portion of the collective-bargaining contract that required it to report new employees to the Union, it is not so clear that such conduct is reachable in this proceeding. I have no doubt that breaching such a contract clause during the 6-month statute of limitations set forth by Section 10(b) of the Act, would violate Section 8(a)(5),<sup>7</sup> but it appears that this conduct is outside of that reach. The charge was filed on April 13, 1994, and the 6-month period extends back only to October 13, 1993. As Respondent's last hire, which it should have reported occurred in August 1993, it is clear that the statute of limitations bars any remedy in this regard. Accordingly, that portion of the complaint will be dismissed.

#### V. REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall require Respondent to immediately offer Greene and Pitts full reinstatement to their previous jobs or, if those jobs are no longer available, to substantially equivalent jobs and to make them whole them for any loss of earning or other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earning as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall be required to convert them to permanent full-time employees in the same fashion it did the 10 temporary employees in May 1994, except that Respondent shall not require them to serve a new probationary period. In addition, Respondent shall be the subject of an expunction order. See *Sterling Sugars*, 261 NLRB 472 (1982).

Based on the foregoing findings of facts and analysis, I make the following

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>6</sup> Similarly, its evidence regarding employee shortened days is inconclusive. I have not detailed it here for it is subject to too many interpretations to be a valid basis for a factual conclusion. I only note that it leaves open such questions as whether a short day may have been requested by the employee or a day off may have been scheduled due to a holiday or other reason unrelated to business volume.

<sup>7</sup> *United Graphics*, 281 NLRB 463 (1986).

2. Communications Workers of America, Local 9503, AFL-CIO is a labor organization within the meaning of Section 2(5) of Act.

3. By discharging its employees Herndon Greene and Johnnie Pitts on February 25, 1994, because the Union sought to represent them, Respondent violated Section 8(a)(3) and (1) of the Act.

4. Respondent has not committed any other violation of the Act within the period prescribed by Section 10(b) of the Act.

Based on the foregoing findings of fact and conclusions of law, as well as the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, Comcraft, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting or joining or seeking to support or join Communications Workers of America, Local 9503, AFL-CIO or any other labor organization.

(b) In any like or related manner threatening, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer Herndon Greene and Johnnie Pitts immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the

discrimination against them, in the manner set forth in the remedy section of the decision. This shall include treating them in the same manner as if they had remained employed through May 1994 and converted to permanent full-time employees with the others and entitled to all of the benefits that a full-time permanent employee would normally enjoy from that date, except that no new probationary period may be imposed upon them.

(b) Remove from its files any reference to the unlawful discharges of Greene and Pitts and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount backpay due under the terms of this order.

(d) Post at its offices in Los Angeles and Northridge, California, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of this notice on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>8</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."